IN THE

Supreme Court of the United States

JOHN F. DAVIS, CLERK

OCTOBER TERM, 1964

NO. 751

FRANK J. RICHARDS,
JULIUS FREDERICK SPINDLER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on September 11, 1964.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit, printed in Appendix A hereto, is reported in 336 F.2d 678.

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 11, 1964. Rehearing was denied on October 13, 1964. An Order Extending Time to File Petition for Writ of Certiorari to December 12, 1964, was entered by this Court on October 26, 1964. The United States District Court for the Southern District of California had jurisdiction by virtue of 18 U.S.C. §1343 and 18 U.S.C. §3231. The United States Court of Appeals for the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §1291 and 28 U.S.C. §1294. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Whether the petitioners' conviction for "Fraud by Wire", 18 U.S.C. §1343, should stand, when the interstate use of the wire was proved by extra-judicial telephone conversations.

Whether the participation and comments by the trial court denied the petitioners a fair and impartial trial.

Statute and Constitutional Provisions Involved

18 U.S.C. §1343:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writ-

ings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined no more than $1,000 or imprisoned not more than five years, or both."

U. S. Const. Amend. VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Statement

The petitioners were charged in a fifteen count indictment for violation of 18 U.S.C. §1343. They were tried by a jury in the United States District Court, in and for the Southern District of California, Southern Division. The jury returned a verdict of guilty for each of the petitioners as to each count of the indictment. Jurisdiction was conferred on the Trial Court by virtue of 18 U.S.C. §1343 and 18 U.S.C. §3231.

The evidence before the Trial Court showed that a "Jack Curtis" made interstate telephone calls allegedly from Hobbs, New Mexico, to finance companies or lending organizations located in Spokane, Washington, New London, Connecticut, Hartford, Connecticut, Atlanta, Georgia, Jackson, Mississippi, and Mobile, Alabama. That these telephone calls were made in furtherance of

a scheme to defraud the various companies. Jack Curtis was never identified nor was there evidence before the Court to show either petitioner to be Curtis or that either petitioner aided and abetted Curtis in his scheme.

The Trial Court, over objection, allowed seven witnesses from the defrauded finance and lending companies to testify at length to their telephone conversations with Jack Curtis. The petitioners objected to the telephone conversations on the ground of hearsay and that the telephone conversations took place out of their presence. The petitioners were tried and convicted on the theory of aiding and abetting Jack Curtis and not on the theory of conspiracy. Without the testimony concerning the interstate telephone calls by Jack Curtis, there was no evidence in the trial to show violation of 18 U.S.C. §1343.

The impartial atmosphere which necessarily must pervade all trials was destroyed during the trial when the petitioners both took the witness stand in their own behalf. The Trial Judge in cross-examination of Petitioner Richards propounded 58 separate and consecutive questions to him. The Trial Judge also examined Petitioner Spindler and asked him 76 separate and consecutive questions. The Trial Judge further during the trial made remarks to counsel such as: "How did you pass the bar examination?"; "I think some of your cross-examination is terrible. I just think it is pointless, much of it."; "Believe me, I would like to get rid of this case. I have had enough of it."

The Court, in charging the jury, commented:

"Again, commenting on the evidence . . . I think this case is quite simple. . . . However, there is no question

from the evidence but that there were telephone calls within the allegations of the Indictment, and that frauds were committed by someone upon the companies involved. . . ."

The Court actually told the jury that the government had proved its case. That interstate telephone calls were made and the frauds were perpetrated. The Court further charged the jury:

"There is no question, and I think it must be conceded that the fraud was perpetrated. There is no question but what they aided and abetted someone in helping the scheme along. . . . "

This comment by the Court informed the jury that "they" [the Petitioners] aided and abetted an unknown and the government had proved its case.

Reasons for Granting the Writ

The gravamen of the "Fraud by Wire" offense, *18 U.S.C. §1343,* is the use of the prescribed item in interstate commerce. The offense requires evidence and proof of an interstate communication. The interstate communications against the Petitioners were proved by third party telephone conversations, hearsay as to the Petitioners.

1. The court below sustained the admission of the third party telephone conversations upon the authority of *Carbo v. United States,* 314 F.2d 718 (9th Cir. 1963), Cert. denied, 84 S.Ct. 1626 (1964). For the

conversation to be admissible the caller need not be identified provided identity can be found from other circumstances. The *Carbo* decision as to the evidentiary foundation for the admission into evidence of telephone conversations is in conflict with other circuit courts of appeal decisions.

The witness testifying called the telephone number given him by the defendant and the answering party identified himself as the defendant. *United States v. Carr*, 219 F.2d 876 (7th Cir. 1955). There was no error in admitting the testimony of a witness concerning an alleged telephone conversation with the defendant. A question of fact was presented for the jury to decide as to whether the person with whom the witness telephonically conversed was the defendant. *Burnett v. United States*, 222 F.2d 426 (6th Cir. 1955).

It is necessary to supply some evidence of the identity of the person with whom the conversation is alleged to have been had. Voice recognition is not necessary, direct or circumstantially. *Andrews v. United States*, 78 F.2d 274 (10th Cir. 1935). The connection between a telephone call and the caller may be established circumstantially, such as dialing the defendant's telephone number and the answering party's acknowledgment that he is the defendant. *Ortiz v. United States*, 317 F.2d 275 (9th Cir. 1963). Identification of the caller and the receiver of a telephone conversation is not necessary when parties at both ends of the line testify to the call. *United States v. Fassoulis*, 293 F.2d 243 (2nd Cir. 1961).

2. The critical element of the crime "Fraud by Wire," 18 U.S.C. §1343, requires proof of the interstate call by the petitioners. The government did not charge the petitioners with conspiracy, to the end that telephone conversations in furtherance of the conspiracy would be admissible, but rather charged the petitioners with aiding and abetting. The totality of the government's proof rested on third party telephone conversations. The reception of inadmissible hearsay evidence was prejudicial error where it was the only evidence against the defendant. *United States v. Dunn*, 299 F.2d 548 (6th Cir. 1962).

3. Settlement by this court of the evidentiary requirements for the admissibility of third party telephone conversations is plainly in the judicial, law enforcement and public interest. The question is even more significant when a conversation based on inadmissible evidence is affirmed.

4. The ultimate issue of the petitioners' guilt or innocence was illustrated by the trial court's participation and expressed by it in commenting to the jury: "There is no question, and I think it must be conceded that the fraud was perpetrated. There is no question but what they aided and abetted someone in helping the scheme along. . . ". The decision of the court below in finding no prejudice to the petitioners is in conflict with *United States v. Meltzer*, 100 F.2d 739 (7th Cir. 1938), and *United States v. DeSisto*, 289 F.2d 833 (2nd Cir. 1961), and the *U. S. Const. Amend. VI.*

The basic dictates of the right to a fair and impartial trial were not afforded these petitioners. The decision of the court below is therefore believed to be erroneous and the substantial influence rationale of *Brocks v. United States,* 309 F.2d 580 (10th Cir. 1962), correct.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RAYMOND E. SUTTON
Counsel for Petitioners.

December 8, 1964.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JULIUS FREDERICK SPINDLER, FRANK J. RICHARDS, etc., *Appellants*,
vs.
UNITED STATES OF AMERICA, *Appellee*.
No. 19,114

[September 11, 1964]

On Appeal from the United States District Court for the Southern District of California, Southern Division

Before: HAMLEY, HAMLIN and BROWNING, Circuit Judges

HAMLIN, Circuit Judge

Julius F. Spindler and Frank J. Richards, appellants herein, and one Charles Rhodes (who did not appeal) were each convicted of fifteen counts of the violation of 18 U.S.C. § 1343 (1958) (fraud by interstate wire) by a jury in the United States District Court for the Southern District of California. Jurisdiction is conferred on this court by 28 U.S.C. § 1291 (1958).

The facts as shown by the record as to the various counts of the indictment are complicated. It was the theory of the prosecution that the guilt of the defendants

below was established to the required degree by circumstantial evidence. There was evidence of many interstate telephone calls, as a result of which several finance companies or lending organizations who had made loans on automobiles were defrauded of various sums of money. The evidence disclosed that the pattern of operation was approximately the same as to the several counts. We shall set out an illustration of the general method used.

On August 31, 1962, one Dressel, assistant collection manager of the Spokane, Washington, office of Pacific Finance, received a telephone call from a person stating that his name was Jack Curtis, representing National Auto Recovery Service, 505 East Dunham, Hobbs, New Mexico. The alleged Curtis stated that National Auto Recovery had located a 1961 Dodge automobile belonging to Pacific Finance at Hobbs, New Mexico, and asked if Dressel wished them to pick up the vehicle and "if the fellow was behind or delinquent in his payments . . ." Pacific Finance was the legal owner of the Dodge. The registered owner was behind in his payments, so Dressel told the caller to pick up the car. On September 14, 1962, Dressel received another telephone call from the alleged Jack Curtis in which the alleged Curtis stated that there was a bid of $1350 for the vehicle. The next day Dressel sent a letter addressed to the National Auto Recovery Service, 505 East Dunham, Hobbs, New Mexico, authorizing the sale of the vehicle. When no money was forthcoming by October 2, 1962, Dressel sent a telegram to the Hobbs, New Mexico, address "asking where the money for the sale of the car was, that we hadn't received it, and I received a call stating that somebody by the name of

Delaney, I believe, had been in an automobile accident, and this was the reason we hadn't received our money, and that we would receive it in the near future, and that he had been in an accident down in Texas." The record shows that this Dodge automobile was sold on September 19, 1962, to a purchaser named Amsterdam in Hollywood, the sales price being $1,000. None of the proceeds of this sale was ever sent to Pacific Finance Company. This general pattern with some variations was shown to have occurred concerning many other automobiles.

The record showed that the Hobbs address was the address of Woodruff's Answering Service and that the telephone number of this answering service was the number given by the alleged Curtis in various telephone conversations. The answering service was in charge of Mrs. Woodruff who testified that she had had a telephone conversation with a "Jack Curtis" in which he said he wanted to use an answering service and also said he was the National Auto Recovery Service. She never personally saw Jack Curtis. However, "Curtis" would telephone the answering service periodically and ask if he had a letter or telegram. If there was a telegram, it would be read to him and he would give instructions as to the handling of the telegram and where to send the reply telegram. The answering service would send the reply telegram from Hobbs with "National Auto Recovery" and the Hobbs address as the only return address. When mail came to the answering service for National Auto Recovery it would be forwarded by the answering service to a post office box number in San Diego.

The record also showed that the various telephone calls to Dressel and others in similar positions did not originate in Hobbs, New Mexico, but that they actually came from two San Diego telephones referred to in the record as the "Park phone" and the "Linda Vista phone." During a one-month period there were twenty-seven telephone calls from the "Park phone" to Woodruff's answering service in Hobbs, and for the same period the closing telephone bill for that phone was over $1800 which was never paid. The "Park phone" had been obtained by the defendant Rhodes using the name of Kenny Idom. The Linda Vista phone was applied for by one "Edward L. Bates" having the address of "Hitching Post, El Cajon Blvd." Appellant Spindler was living at that motel under the name of Ed Bates and appellant Richards was seen there with Spindler during that time. Richards was also registered at the Hitching Post Motel and when he left defendant Rhodes moved in with Spindler. Spindler then had possession of one of the automobiles involved. Appellant Richards was involved in the sale of two of the automobiles and Spindler was involved in the sale of three of the automobiles. There was testimony that Richards had stated that "he was working for or was a partner of 'Jack Curtis' with the National Recovery Service." One Whaley testified that he had telephone calls from a person claiming to be Jack Curtis and that on various occasions Curtis gave him authorizations and instructions to repossess eight automobiles. Whaley testified that he did repossess the vehicles for the National Auto Recovery Service and turned them over to "Tommie" without requiring receipts. He had no telephone number or address for "Tommie." There was

testimony that Spindler, Richards, and Rhodes had been seen frequently at the Park phone address and that they had used the telephone at that address. A witness testified that she told Rhodes "Your phone sure is busy all the time" and that Rhodes told her she wasn't supposed to know anything.

Spindler and Richards at various times had been in the auto repossession business and had contacts with many auto dealers. They contended they had dealings with "Curtis" concerning repossessions of automobiles and had assisted "Curtis" in the sale of some of the automobiles in question, and on occasion one or the other of them had received money from Curtis for services. The testimony of each of them was on occasion inconsistent with and contradictory to that of the other and of other witnesses in the case. Richards had been twice previously convicted of a felony. Richards had stated that "he was working for, or was a partner of" Jack Curtis with the National Recovery Service. A witness testified that a person claiming to be Jack Curtis gave him the address of National Recovery Service as 932 North Western, Los Angeles, which was Spindler's office. We have not attempted to set out all of the testimony, but the foregoing is at least a partial summary and will suffice to understand the contentions of appellants.

In his opening statement to the jury the prosecutor stated that he expected to prove that a government witness had been threatened with death by defendant Rhodes if she testified against him. The prosecution was not able to prove this, because the court would not allow him to introduce this evidence upon the ground that it was too

prejudicial. The prosecutor did not withdraw the remark and appellants now complain of this as prejudicial misconduct. The accusation was made against defendant Rhodes alone who is not an appellant here. Moreover, it would seem that if the prosecutor had spoken up on his own and offered to withdraw the statement, defendants' counsel would probably have been on their feet instantly to object on the theory that the reiteration of the contention would be more prejudicial than silence. In any event we see no error in this situation.

Appellants next complain that the admission of various telephone conversations between government witnesses in various parts of the country and a person who stated that he was Jack Curtis of the National Auto Recovery Service was in error. The district court instructed the jury that these conversations were not binding on the appellants unless they were connected up with the appellants and if they were not so connected they should be stricken and disregarded entirely. The government contends that by the circumstantial evidence properly admitted it was a question for the jury to determine whether or not they were chargeable to the appellants. We agree. We have set forth above some of the voluminous circumstantial evidence connecting appellants with the frauds that were committed, and we believe that there is abundant evidence in the record from which the jury could find that the appellants either made the telephone calls or knowingly and unlawfully aided and abetted the person or persons making them.[1] As stated in *Carbo v. United States*, 314

[1]The government was not attempting to prove the truth of the statements made in these conversations.

F.2d 718, 743 (9th Cir. 1963), *cert. denied*, 84 Sup. Ct. 1626 (1964):

> "The connection between a telephone call and the caller may be established circumstantially. The issue for the trial judge in determining whether the required foundation for the introduction of the evidence has been established is whether the proof is such that the jury, acting as reasonable men, could find its authorship as claimed by the proponent. The scope of appellate review upon this issue is confined to determining whether the admission constituted abuse of judicial discretion in determining that a prima facie case had been made out."

We hold that the district judge did not abuse his discretion in admitting these phone calls in evidence.

The next contention is that the court failed to require the FBI Agent Palmros to produce notes of a statement of the defendant Rhodes. The witness first testified that he had made notes of the conversation with Rhodes but later, after examining his file and not being able to find the notes, stated that he did not recall exactly whether he ever made notes on the conversation but if he did make the notes they had been burned up. There was no positive showing that the notes had ever been in existence or were in existence at the time of the trial; nor does the record show that the request for these notes was made by counsel for appellants, but rather by counsel for the defendant Rhodes who was convicted but is not here an appellant. In any event, we see no error.

The appellants next complain that the court abused its discretion in allowing a witness to testify who had been present in court during the time that there had been in effect an order excluding witnesses. Appellant concedes that a witness is not disqualified as such merely because of a violation of such a rule, but that whether he shall be permitted to testify or not is a matter within the discretion of the court. *Holder v. United States,* 150 U.S. 91 (1893); *Coates v. United States,* 59 F.2d 173 (9th Cir. 1932); *United States v. Schaefer,* 299 F.2d 625 (7th Cir.), *cert. denied,* 370 U.S. 917 (1962). The witness testified to a brief telephone conversation that he had had with the appellant Richards which presumably occurred outside of the presence of any witnesses that had preceded him. We see no abuse of discretion in the court's action in permitting the witness to testify.

Appellants next complain that during the trial of the case on various occasions the district judge examined the witnesses, made comments to counsel for appellants, and generally conducted himself in a manner prejudicial to appellants' case. We have examined the record in this connection and also the comments made by the district judge during the instructions to the jury upon the various witnesses. We find nothing to criticize in the judge's conduct. A district judge has a right and indeed a duty to elicit facts from the witnesses in order to obtain a clear presentation of the issues. *Dranow v. United States,* 307 F.2d 545 (8th Cir. 1962). Such examination of the witnesses as was here made by the court was done in an entirely impartial manner and the comments of the district judge to counsel in the case, when taken

in context, were in no way improper or prejudicial to either of the appellants.

Appellants also complain of the instructions to the jury given on the theory of aiding and abetting. No objection was made by counsel to the instructions on this subject as required by Rule 30, Federal Rule of Criminal Procedure and, as we see it, the giving of such instructions was neither plain nor any error.

Finally, appellants contend that "the verdict is contrary to the law and the evidence" and "there was no direct evidence connecting either of the appellants in any of the crimes and the circumstantial evidence was not credible." We have above referred in part to some of the evidence that was introduced. Much additional evidence was also presented. We are, of course, required to view the evidence in the light most favorable to the government and, viewed in that light, we hold that there was substantial evidence in the record to support the conviction of each of the appellants. *Whaley v. United States,* 324 F.2d 356, 358 (9th Cir. 1963), *cert. denied,* 376 U.S. 911 (1964).

Judgment affirmed.